BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C. 20554



| | | |
|---|---|---|
| **In the Matter of** | ) | |
| | ) | |
| **Amendment of Section 2.106 of the** | ) | **ET Docket No. 95-18** |
| **Commission's Rules to Allocate** | ) | |
| **Spectrum at 2 GHz for Use by the** | ) | |
| **Mobile-Satellite Service** | ) | |



**To: The Commission**

## REPLY COMMENTS OF THE AMERICAN PETROLEUM INSTITUTE

Wayne V. Black
Nicole B. Donath
**KELLER AND HECKMAN LLP**
1001 G Street, Suite 500 West
Washington, D.C. 20001
(202) 434-4100

Its Attorneys

Dated: March 5, 1999

## TABLE OF CONTENTS

## SUMMARY

Having been unsuccessful in their efforts to convince the Commission to abandon its reimbursement policies with regard to 2.1 GHz band relocations, certain MSS interests now seek to whittle away at their relocation obligations by, among other things, advocating a "sunset" date that is less than six years from now, recommending that incumbents be compensated only for the depreciated value of their equipment and proposing to limit in an inappropriate manner the ability of incumbent licensees to modify and renew their authorizations. API urges the Commission to reject these suggestions and hold firm in its resolve to foster a smooth transition of the 2.1 GHz band to the MSS and other new services while at the same time ensuring that displaced incumbent licensees are "made whole" with respect to the costs of relocating to new spectrum or services.

Like many of the other parties that have commented in this proceeding, API believes that most of the basic relocation policies implemented in the PCS context also would be appropriate for the 2.1 GHz band. Such policies include: the establishment of voluntary and mandatory negotiation periods beginning after the issuance of final rules in this proceeding; a subsequent involuntary relocation period during which displaced incumbents must be provided with comparable facilities (not subject to depreciation); and a privately-administered cost-sharing program in which both emerging technology licensees and self-relocating incumbents may participate. API also urges the

Commission to continue to allow the licensing, modification and renewal of Fixed Service systems in the 2.1 GHz band under the conditions set forth in the Commission's current rules.

In light of circumstances unique to the deployment of MSS and/or to make the existing rules more fair or effective, API further believes that the following rule amendments would be warranted here: (1) the implementation of a two-year voluntary negotiation period or, at the very least, a two-year mandatory negotiation period; (2) the adoption of a sunset date that is far enough in the future to better reflect the longevity of incumbents' existing equipment; and (3) confirmation that Fixed Service incumbents who self-relocate to leased facilities may obtain reimbursement through the cost-sharing plan. Finally, API notes that Iridium's proposal to require incumbents to relocate to comparable facilities within three years or forfeit their reimbursement rights is problematic due to potential backlogs in the supply of replacement equipment and the possibility that it will result in the premature relocation of incumbent systems.

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C. 20554

| | | |
|---|---|---|
| **In the Matter of** | ) | |
| | ) | |
| **Amendment of Section 2.106 of the** | ) | **ET Docket No. 95-18** |
| **Commission's Rules to Allocate** | ) | |
| **Spectrum at 2 GHz for Use by the** | ) | |
| **Mobile-Satellite Service** | ) | |

**To: The Commission**

## REPLY COMMENTS OF THE AMERICAN PETROLEUM INSTITUTE

The American Petroleum Institute ("API"),by its attorneys, pursuant to Section 1.415 of the Rules and Regulations of the Federal Communications Commission ("Commission"), respectfully submits the following Reply Comments regarding Comments filed by other participants in response to the Commission's *Memorandum Opinion and Order and Third Notice of Proposed Rule Making and Order* ("*Third Notice*"),[1/] in the above-captioned proceeding.

---

[1/] 63 Fed. Reg. 69606 (December 17, 1998).

## I. REPLY COMMENTS

1. The Comments filed in response to the *Third Notice* present a wide variety of viewpoints regarding the transition of the 2.1 GHz band from the Fixed Service ("FS") and Broadcast Auxiliary Service ("BAS") to the Mobile Satellite Service ("MSS"). However, while certain MSS interests continue to challenge the Commission's well-founded decision to require MSS licensees to reimburse incumbents for the costs of relocating to alternative spectrum, most parties (including some MSS applicants) accept this premise and agree that the basic *Emerging Technologies* framework -- subject to modification in various regards -- can and should be applied in the present context. Like many commenting parties, API acknowledges that the deployment of MSS differs in certain respects from the circumstances surrounding the deployment of the Personal Communications Service ("PCS") in the lower 2 GHz band, but it believes that the Commission and all interested parties can work together to develop policies and procedures, based on the existing model, that will foster a smooth and equitable transition of the 2.1 GHz band to the MSS and other new services. Toward this end, API offers the following Reply Comments.

### A. There Must be Adequate Time for Both Voluntary and Mandatory Negotiations

2. In its Comments, API urged the Commission to establish a two-year voluntary negotiation period for (non-public safety) FS incumbents commencing no sooner than the effective date of the 2.1 GHz band relocation rules to be adopted in this

proceeding. Most of the other parties that commented on this issue believe that the onset of the voluntary period (whatever its duration) should coincide with the date on which MSS licenses are granted.[2/] The ICO USA Service Group ("IUSG"), by contrast, advocates a one-year voluntary negotiation period that would have begun on July 22, 1997 (the date that MSS applications first were filed) and, accordingly, terminated on July 22, 1998.[3/] Somewhat incomprehensibly, IUSG claims that such a voluntary period would provide the parties with "adequate time to resolve the issues at stake."[4/]

3. API does not object to starting the voluntary period upon grant of the MSS licenses in question, provided that it is no sooner than the date on which the Commission's new rules are issued. From a practical standpoint, the parties are unlikely to begin negotiations until the Commission has announced that the voluntary period has begun, determined the length of the voluntary period and adopted rules governing both

---

[2/] See Comments of: the Association of Public-Safety Communications Officials-International, Inc. ("APCO") at 4; Constellation Communications, Inc. ("Constellation") at 6; SBC Communications, Inc. ("SBC") at 6; UTC, The Telecommunications Association ("UTC") at 5-6.

[3/] Comments of IUSG at 43.

[4/] Comments of IUSG at 37. IUSG states that adopting a voluntary negotiation period that already has expired "would properly acknowledge the fact that sporadic talks between MSS and BAS licensees on the subject of 2 GHz relocations have already been underway for some time." Id. IUSG does not, however, make a similar claim with respect to FS licensees, and API is unaware of any talks that already have occurred between MSS and FS licensees which would amount to voluntary negotiations for the relocation of any particular FS systems.

negotiated and involuntary relocations in the 2.1 GHz band. Thus, any start date that precedes the adoption and release of the new rules would essentially be a retroactive one which would provide the parties with less than the designated period (whether one or two years) during which to conduct voluntary negotiations.

4. For the reasons expressed in its Comments, API also continues to believe that a two-year voluntary negotiation period would be appropriate here.[5/] In the event, however, that the Commission nonetheless adopts a one-year voluntary period, API agrees with UTC that the mandatory negotiation period should be extended to two years so as to reflect added complexities not present in the PCS context.[6/] In other words, the Commission should provide the parties with a total of at least three years to negotiate mutually agreeable terms for the migration of incumbent operations from the 2.1 GHz band. Otherwise, the vast majority of relocations will be on an involuntary basis, necessitating compliance with detailed regulatory standards and, in some instances, the

---

[5/] See Comments of API at 6-7.

[6/] See Comments of UTC at 4. API also reminds the Commission and the MSS industry that under the Commission's existing relocation rules, the mandatory negotiation period does not begin on a fixed or uniform date for all parties and negotiations, but must instead be triggered in each instance at the option of the MSS licensee following termination of the voluntary negotiation period. 47 C.F.R. § 101.73(a). If this rule were applied in the 2.1 GHz context (as API believes it should be), the mandatory period could not -- as IUSG suggests -- automatically begin for all parties upon issuance of the Commission's Report and Order establishing relocation policies in this proceeding. See Comments of IUSG at 43.

potential intervention of the Commission to resolve disputes that may arise concerning the application of these standards.

## B. Displaced Incumbents Should be Provided With Truly Comparable Facilities in Another Spectrum Band

5. API members are proud to have played a vital role in the construction and operation of domestic private microwave communications facilities. These systems are, without a doubt, among the most reliable in the world. Yet, MSS proponents would have the Commission believe that reimbursement for the depreciated (or "book") value of these systems -- rather than the costs of comparable facilities -- would be sufficient.[7/] API vehemently objects to this proposal because it would force API member companies to subsidize the introduction of for-profit MSS service. Reimbursement of depreciated value does not render an incumbent whole because the incumbent must still purchase new equipment to replace equipment that -- absent the need to relocate -- could have remained in service in most instances for many years to come. The existing rules for involuntary relocations reflect this fact by requiring the provision of "comparable facilities" (in terms of throughput, reliability and operating costs), without reference to the age or depreciated value of existing equipment. See 47 C.F.R. § 101.75(b).

---

[7/] See Comments of: The Boeing Company ("Boeing") at 2; ICO Services Limited ("ICO") at 14-15; IUSG at 44.

6. API also takes issue with IUSG's suggestion that, where possible, the Commission should permit the relocation of FS incumbents to a new location within the 2 GHz band for an interim period.[8/] Given that incumbents ultimately will need to be relocated to other spectrum, there is absolutely no reason why they should be subjected to potential repeated retunings within the 2 GHz band. Even if the MSS industry were required to compensate incumbents for each retuning, there are intangible costs that could never be recovered such as incumbents' time and the risk of disruption to critical operations. Accordingly, the Commission should reject IUSG's proposal as yet another groundless attempt to evade its members' relocation obligations.

7. As API has noted on prior occasions, there is no basis for the claims of some entities in the MSS industry that they will abandon their plans to provide service if they are forced to expend a large sum of money to reimburse incumbents for relocation. Not only will global MSS companies reach a vast number of subscribers around the world, but those subscribers often will be located in remote locations where no other alternative service exists to that provided by the MSS industry. Thus, far from being cash-strapped, MSS operations promise to be an unprecedented windfall for those companies that gain access to 2.1 GHz spectrum. Under these circumstances, the

---

[8/] Comments of IUSG at 44.

Commission should not shy away from its goal of ensuring that incumbents are fairly compensated for their relocation costs.[9/]

### C. A Premature Sunset Date Would Delay Negotiations and Unjustly Penalize FS Incumbents

8. Not surprisingly, incumbent interests generally oppose the sunsetting of relocation rights or advocate a sunset period of at least ten years,[10/] while MSS entities typically favor a much shorter sunset period.[11/] At the very least, API urges the Commission to recognize that adoption of the January 2005 sunset date proposed by certain MSS licensees likely would require many incumbents to incur the entire cost of relocating facilities that are in good condition and capable of operating well beyond that

---

[9/] ICO has proposed that MSS licensees be required to pay only for "accommodation such as technical assistance, product development support and operational constraints." Comments of ICO at 10 and Exhibit A. For the many reasons discussed above, the Commission should reject this proposal as bad policy. Moreover, because the issue of reimbursement for comparable facilities already has been determined on reconsideration in this proceeding, ICO's proposal is not an appropriate subject for comment at this time.

[10/] See, e.g., Comments of: the Association of American Railroads ("AAR") at 8-10 (opposing any sunset date); APCO at 2-3 (opposing sunset date for public safety incumbents); UTC at 5-6 (supporting ten-year sunset period, beginning upon onset of voluntary negotiation period).

[11/] See, e.g., Comments of: Constellation at 5 (recommending sunset date of January 31, 2005); Globalstar, L.P. ("Globalstar") at 3-4 (advocating substantial shortening of ten-year sunset period); ICO at 6-7 (proposing sunset date of January 1, 2005); IUSG at 43 (same).

date. MSS licensees should not be permitted to whittle away in this manner at their legitimate relocation and reimbursement obligations.[12/]

9. API believes that the adoption of any sunset date inevitably would create incentives for MSS licensees to delay implementation of service to new areas and to forestall negotiations in subsequent years. Should the Commission nevertheless determine that a sunset date is warranted, API urges it to encourage negotiations and the prompt deployment of MSS systems by: (1) adopting a sunset period of at least fifteen years; or (2) initiating a ten-year sunset period at the onset of the involuntary relocation period.[13/] API also believes that the Commission should affirm that the protections afforded to "sunsetted" incumbents under Section 101.79 of its rules (including the requirement that incumbents be provided six months notice to vacate the spectrum), are applicable with respect to 2.1 GHz band relocations. Toward this end, API agrees with SBC that the Commission should allow extensions of the six-month period where an

---

[12/] In a shameless attempt to "have their cake and eat it too," IUSG and ICO -- likely early entrants in the MSS market -- urge the Commission to sunset incumbents' reimbursement rights less than six years from now, but to extend beyond ten years the cost-sharing obligations of later-entrant MSS licensees. See Comments of ICO at 13-14; Comments of IUSG at 57. It simply makes no sense to have two different sunset dates of this nature: why should a subsequent MSS licensee or auction winner be expected to reimburse early-entrant MSS providers if the licensee enters the market after the obligation to reimburse incumbents has expired?

[13/] See further discussion in API's Comments at 10-11.

incumbent's relocation entails either international coordination or negotiation with a state or Federal agency.[14/]

## D. FS Licensing, Modifications and Renewals Should Continue Under Existing Rules

10. Several MSS entities urge the Commission to place a freeze on the issuance of new or modified FS licenses in the 2.1 GHz band and/or to condition future license renewals on secondary status.[15/] These commenters seem to be under the mistaken assumption that the Commission has been continuing to grant 2.1 GHz band licenses with primary status to FS applicants. In fact, the Commission's current rules expressly provide that all such license grants are on a secondary (non-interference) basis only. 47 C.F.R. § 101.147 (a) n.20. As MSS providers therefore need not be concerned that they will be expected to relocate any additional FS incumbents besides those that are already in existence, there is no reason to discontinue this secondary licensing practice.

11. With respect to FS license modifications in the 2.1 GHz band, API notes that the Commission's rules presently allow FS incumbents to make certain minor modifications and corrections to their licenses without forfeiting their primary status, but any other changes are on a secondary basis unless the incumbent establishes that the

---

[14/] Comments of SBC at 4-6.

[15/] See Comments of ICO at 7; IUSG at 41-42; TMI Communications and Company at 5-6.

modification would not add to the relocation costs of MSS providers or other subsequent licensees. 47 C.F.R. § 101.81. This rule strikes a fair and appropriate balance between the need of incumbents to adjust certain parameters of their operations from time to time and the desire of new licensees for some certainty as to the nature and extent of incumbent operations that potentially are subject to relocation. Accordingly, the Commission should not bar all license modifications by incumbents. Further, the Commission should reject outright the suggestion that all FS license renewals be conferred secondary status as yet another effort by MSS proponents to inappropriately limit incumbents' reimbursement rights.[16/] If there is to be a time that such rights terminate, it should be a sunset date that applies equally to all FS incumbents. Conditioning license renewals on secondary status would serve only to unfairly penalize those incumbents whose licenses happen to be set to expire in the near term.

### E. Self-Relocation of Microwave Systems to Leased Services Should be Reimbursable

12. As both API and UTC recommend in their Comments, the Commission should promote prompt, system-wide relocations of FS systems by permitting incumbents who voluntarily relocate to other spectrum to obtain reimbursement through the cost-

---

[16/] API also addresses this issue in its Opposition to ICO's pending "Petition for Further Limited Reconsideration" in this proceeding. See API Opposition (filed Feb. 22, 1999) at 10-11.

sharing plan.[17/] In addition, to provide all incumbents with a realistic opportunity to exercise this option, API believes that cost-sharing for self-relocation also should be available to FS incumbents who would prefer to relocate to leased services, rather than purchasing new systems.[18/] Otherwise, it will be in the interests of such incumbents to delay relocation until an appropriate reimbursement agreement is reached with an MSS provider. With respect to the amount of reimbursement that incumbents who self-relocate to leased facilities should be eligible to receive, API proposes that it should be based on the actual cost of the leased facilities through the "sunset" of the relocation rules, but not to exceed the value of a comparable replacement system. In this way, each FS incumbent would have the flexibility to choose the most appropriate type of replacement system or services, without imposing any additional costs upon MSS and other new licensees in the 2.1 GHz band.

## F. The Iridium Proposal is Problematic

13. In its Comments, Iridium LLC ("Iridium") proposes to require incumbents to relocate to comparable facilities no later than three years from the date on which the Commission grants licenses to MSS operators; incumbents that failed to meet this

---

[17/] Comments of API at 14-15; Comments of UTC at 7-8.

[18/] API first raised this issue with the Commission in its pending Petition for Reconsideration of the Commission's Second Report and Order in the "Microwave Relocation Cost-Sharing" proceeding. See API Petition at 7-8 (filed April 16, 1997 in WT Docket No. 95-157).

deadline would be deemed ineligible for reimbursement.[19/] While API welcomes Iridium's efforts to derive relocation policies that encourage prompt clearing of the 2.1 GHz band and provide incumbents with fair compensation, API envisions certain practical and analytical drawbacks to Iridium's proposal. First, and perhaps most significant, it is quite possible that equipment manufacturers would not be able to satisfy the demand for many thousands of new microwave systems during a three year period. Therefore, if the Commission is even to consider a proposal such as Iridium's, it should allow a transition period of at least five years; further, it should permit incumbents to retain their reimbursement rights beyond the expiration of the transition period upon demonstrating that the failure to relocate was due to the lack of available replacement equipment or other circumstances beyond their control.

14. API also is concerned that the adoption of Iridium's proposal could require the relocation of FS incumbents before there is even a threat of interference between MSS and FS systems. In fact, it is possible that some, if not all, MSS systems will not even be ready for deployment by the end of the proposed three-year transition period. Under these circumstances, it would be premature to require all incumbents to relocate during this time. Finally, for the reasons noted in Section E above, any forced self-relocation policy such as that proposed by Iridium should allow incumbents to receive reimbursement for relocating to leased services, as well as private replacement systems.

---

[19/] Comments of Iridium at 2-3.

## II. CONCLUSION

15. API believes that, in most respects, the application of the Commission's existing relocation and reimbursement policies would be appropriate in the context of the 2.1 GHz band. For instance, API supports the adoption here of the existing rules which seek to ensure that displaced incumbents are provided with truly comparable facilities (not subject to depreciation), allow FS licensing, modifications and renewals in the 2.1 GHz band under certain conditions and permit incumbents who relocate their own systems to obtain reimbursement through the cost-sharing plan. To reflect certain circumstances unique to the deployment of MSS and/or improve upon the existing rules, however, API also recommends various minor changes, including: (1) the adoption of a three-year period for concluding voluntary and mandatory negotiations; (2) the extension

of the sunset date beyond the proposed ten-year period; and (3) the conferral of reimbursement rights upon FS incumbents who self-relocate to leased facilities.

**WHEREFORE, THE PREMISES CONSIDERED,** the American Petroleum Institute respectfully submits the foregoing Reply Comments and urges the Federal Communications Commission to act in a manner consistent with the views expressed herein.

Respectfully submitted,

**THE AMERICAN PETROLEUM INSTITUTE**

By: Wayne V. Black

Wayne V. Black
Nicole B. Donath
**KELLER AND HECKMAN LLP**
1001 G Street, Suite 500 West
Washington, D.C. 20001
(202) 434-4100

Its Attorneys

Dated: March 5, 1999